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**UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA**

In re BANC OF CALIFORNIA
SECURITIES LITIGATION

CASE NO. 8:17-cv-00118-DMG (DFMx)

CLASS ACTION

This Document Relates To:
ALL ACTIONS.

**LATHAM & WATKINS LLP'S
OPPOSITION TO NONPARTY MUDDY
WATERS CAPITAL LLC'S MOTION
FOR SANCTIONS AND CONTEMPT
ORDER AGAINST DEFENDANT
STEVEN A. SUGARMAN AND
LATHAM & WATKINS LLP**

Hearing Date: December 15, 2023
Time: 9:30 A.M.
Judge: Hon. Dolly M. Gee
Courtroom: 8C

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1 **I. INTRODUCTION**

2 Muddy Waters Capital LLC (“Muddy Waters”) alleges that on February 22,
3 2019 Latham & Watkins LLP (“Latham”) violated the Protective Order (the
4 “Protective Order” or “Order”) issued in *In re Banc of California Securities*
5 *Litigation*, No. 17-cv-00118 (November 13, 2017 C.D. Cal.), Dkt. 83 (the
6 “Underlying Action” or the “Action”)¹ by designating the expert report of Professor
7 Charles Lee (the “Lee Report” or “Report”) as “Confidential” instead of “Highly
8 Confidential - Attorneys’ Eyes Only” (“AEO”). Muddy Waters also alleges that
9 years later after the Action was dismissed, Mr. Sugarman violated the Protective
10 Order by causing a former employee to send the Report to a news reporter and by
11 Mr. Sugarman disclosing information derived from the Report in a recorded
12 interview. Latham submits this Opposition solely on its own behalf and defers to Mr.
13 Sugarman and his separate counsel to respond to his alleged conduct.

14 Sanctions, contempt, and discovery are not appropriate here because Latham
15 substantially complied with the Protective Order by designating the Lee Report as
16 “Confidential.” See *In re Dual-Deck Video Cassette Recorder Antitrust Litig.*, 10
17 F.3d 693, 695 (9th Cir. 1993) (substantial compliance is a defense to contempt
18 action). Under the Protective Order, information that is “derived from” AEO-
19 designated information also constitutes AEO information “to the extent the derived
20 information embodies, contains, or discloses” AEO-designated information. Order,
21 II.2. The entire Lee Report is not “derived from” Muddy Waters’ small and largely
22 cumulative document production. Rather, it expresses an opinion that was formed
23 from documents independent of and received prior to Muddy Waters’ production; in
24 fact, the opinion in the Report was disclosed in court months before Muddy Waters’
25 small and incomplete document production. In addition, the Muddy Waters
26 documents contain little more than trading data that were largely duplicative of data
27

28 ¹ All Dkt. citations refer to the Docket in *In re Banc of Cal. Sec. Litig.*, No. SACV
17-00118 (DFMx) (C.D. Cal. Jan. 23, 2017), unless otherwise indicated.

1 Lee obtained from other sources (which Muddy Waters itself conceded), [REDACTED]
2 [REDACTED]
3 [REDACTED]
4 [REDACTED]
5 [REDACTED]
6 [REDACTED]
7 [REDACTED]
8 [REDACTED]

9 [REDACTED] For these reasons, the Lee Report is not “derived from” and
10 does not “embody, contain, or disclose” the Muddy Waters AEO-designated
11 documents sufficient to warrant designating the entire Report as AEO as Muddy
12 Waters contends. *See infra* Section IV.A.

13 Latham’s substantial compliance is also demonstrated by its effort to comply
14 with the Protective Order throughout the entire complex Action, which involved 120
15 document productions from 56 entities totaling over 1.2 million pages of documents,
16 a substantial portion of which were designated as “Confidential” or “AEO” under
17 the Protective Order, and during which Latham filed over 100 documents in
18 connection with sealing requests pursuant to the Protective Order.

19 Sanctions, contempt, and discovery are also inappropriate even if the
20 designation of the Lee Report as “Confidential” technically fell short of full
21 compliance. An alleged technical violation of a protective order in an incredibly
22 complex litigation requiring near-daily application of the Protective Order does not
23 fail to satisfy the substantial compliance standard in a manner sufficient to warrant
24 civil contempt or other sanctions. *See, e.g., Youngevity International v. Smith*, 2019
25 WL 157269, at *1-2 (S.D. Cal. Jan. 10, 2019) (denying sanctions for a few improper
26 disclosures in a case with voluminous discovery and otherwise adherence to
27 Protective Order). The cases imposing such sanctions and contempt involve much
28 more egregious conduct. *See infra* Section IV.B.1.

1 Furthermore, when Latham received Muddy Waters' objection to the
2 designation, Latham offered to follow the procedures in the Protective Order
3 designed for circumstances involving inadvertent or other disclosure of designated
4 material:

5 If a receiving party learns that, by inadvertence or
6 otherwise, it has disclosed designated material to any
7 person or in any circumstance not authorized under this
8 Order, it must immediately (i) notify in writing the
9 designator of the unauthorized disclosures, (ii) use its best
10 efforts to retrieve all unauthorized copies of the designated
material, (iii) inform the person or persons to whom
unauthorized disclosures were made of all the terms of this
Order, and (iv) use reasonable efforts to have such person
or persons execute the Agreement to Be Bound (Exhibit
A).

11 Protective Order, VI.²

12 The request for discovery also should be denied because such discovery is
13 disfavored, unduly burdensome, and raises complex issues relating to attorney-client
14 privilege and work product. The requested discovery also appears at least in part if
15 not wholly intended to allow Muddy Waters to obtain information for parallel legal
16 disputes with Mr. Sugarman. *See infra* Section IV.B.3. Finally, Muddy Waters has
17 made public much of the information it claims was "derived from" AEO-designated
18 documents, including for example by publicly filing as an exhibit to their Motion the
19 transcript of a recorded conversation that they claim contains "derived from"
20 information and distributing the Lee Report itself to persons without confirming they
21 were subject to the Protective Order. Muddy Waters' own failure to treat this
22 information as "derived from" AEO-designated documents discredits their claim
23 that the Protective Order was violated and their requests for contempt, sanctions, and
24 discovery. *See infra* Section IV.B.2.

25
26
27
28

² Latham makes this offer in an effort to resolve this matter and without conceding
any violation of the Protective Order.

1 **II. BACKGROUND**

2 **A. The Record Demonstrates Latham's Extensive Efforts To Comply**
3 **With The Protective Order In This Complex and Intensely**
4 **Litigated Case**

5 Just prior to October 18, 2016, Muddy Waters and certain other traders [REDACTED]
6 [REDACTED]
7 [REDACTED] On October 18, 2016, an
8 anonymous blogger published a report on a website ("Blog") called "Seeking Alpha"
9 falsely and misleadingly suggesting that Banc could be controlled by a notorious
10 criminal. The misleading Blog caused the stock to plummet [REDACTED]
11 [REDACTED] After the stock
12 dropped, the Action was brought against Banc and its then-Chief Executive Officer
13 Steven Sugarman by a class of Banc shareholders.

14 The Parties to the Action agreed to a Protective Order which allowed them to
15 designate "confidential, proprietary, personal and/or trade secret" information as
16 "Confidential," and "extremely sensitive" information "disclosure of which" would
17 "create a substantial risk of serious harm" as AEO. *See* Protective Order, II.1 & 2.
18 The Order states that information "derived from" designated material also
19 constituted designated material "to the extent the derived information embodies,
20 contains, or discloses" designated material. *Id.* Material made public could not be
21 designated under the Order. *Id.*, II.3. A "receiving party" was allowed to disclose
22 documents designated as Confidential to certain entities including their officers,
23 directors and employees, and documents designated as AEO to a more limited set of
24 entities that did not include officers, directors, and employees. *Id.*, IV.2 & 3.

25 A substantial portion of the 1.2 million pages of discovery produced in 120
26 productions by 56 entities appeared to have been designated either "Confidential" or
27 "AEO." Declaration of Manny Abascal ("Abascal Decl.") ¶ 3. The Action was
28 intensely litigated, with over 1,200 documents filed over 600 docket entries. Latham

1 alone prepared and submitted over 100 court filings in connection with more than
2 30 motions to seal in compliance with the Protective Order. *Id.* ¶ 4. The high volume
3 of designated materials and case activity required Latham to make hundreds of
4 decisions interpreting and applying the Protective Order, such as what materials
5 could be disclosed, redacted, or withheld in correspondence, court filings,
6 depositions, expert reports, witness meetings, or other communications.

7 In September 2019, Banc agreed to settle, *see* Dkt. 592, and the case was
8 dismissed in 2020. Dkt. 614. Mr. Sugarman did not contribute money to that
9 settlement; rather, Plaintiffs dismissed him with prejudice and publicly
10 acknowledged that the Blog was unsupported by evidence. Dkt. 617. Latham spent
11 over 100 hours complying with the terms of the Protective Order regarding the return
12 or destruction of designated material upon termination of the litigation. Abascal
13 Decl. ¶ 5.

14 **B. Muddy Waters Never Produced the Key Documents Sought by Mr.
15 Sugarman, and Instead Produced Largely Duplicative Trading
16 Data of Little Relevance**

17 A key issue in the Action was the cause of the October 18, 2016 drop in Banc's
18 stock price. Plaintiffs contended the stock dropped because Defendants failed to
19 make certain required disclosures to investors, while Defendants argued that it
20 dropped because certain traders manipulated the market by shorting the stock prior
21 to the misleading Blog, publishing the Blog to create a panic and stock drop, and
22 then closing their positions for immense profits before the investing public realized
23 the Blog was false. Defendants called this a scheme to "short and distort" the stock.

24 To support this "short and distort" theory, Mr. Sugarman and his experts
25 obtained and reviewed, months before Muddy Waters produced any documents,
26 public information and data from FINRA, Bloomberg, and other sources which
27 revealed that [REDACTED]
28 [REDACTED]

1 [REDACTED] On September 11, 2018, Mr. Sugarman issued a third party subpoena to
2 Muddy Waters to produce documents regarding the reasons for their trades in Banc
3 stock, communications with other traders and the anonymous blogger, and other
4 evidence [REDACTED] On October 3, 2018, Muddy Waters
5 filed publicly a motion to quash the subpoena that attached the subpoena as an
6 exhibit, thus alerting the public of its involvement in the Action. *See* Motion to
7 Quash, *In re Subpoenas to Produce Documents, Information, or Objects to Muddy*
8 *Waters Capital LLC, et al.*, Case No. 18-mc-80175 (N.D. Cal. October 17, 2018),
9 Dkts. 1 & 1-1.³ In his October 17, 2018 opposition to the motion, Mr. Sugarman
10 outlined in detail [REDACTED] *See* MW Dkt. 6-4 at 1 & 5-9 (sealed
11 Opposition to Motion to Quash). The Opposition identified Muddy Waters [REDACTED]
12 [REDACTED]
13 [REDACTED]
14 [REDACTED]
15 [REDACTED]
16 [REDACTED]

17
18 *Id.* at 1; *see also id.* at 5-9 (describing in further detail the trading data gathered). At
19 the same time, Mr. Sugarman filed under seal a declaration by a colleague of
20 Professor Lee [REDACTED]
21 [REDACTED]
22 [REDACTED]
23 [REDACTED]
24 [REDACTED]
25 [REDACTED]
26 [REDACTED]

27 _____
28 ³ “MW Dkt.” refers to the motion to quash proceedings which were filed in N.D.
Cal. No. 18-mc-80175 and then transferred to C.D. Cal. No. 18-mc-00147.

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2

3 MW Dkt. 9-1 at 6 (sealed Declaration of Torben Voetmann filed in support of the
4 Opposition); *see also id.* at 4-6 (describing trading data).

5 Muddy Waters filed its Reply publicly and admitted that it short sold Banc
6 stock: “MWC was never net long in Banc securities, and any equity purchases were
7 made to cover short positions.” MW Dkt. 11 at 1 n.1. Muddy Waters also
8 acknowledged that Mr. Sugarman already possessed Muddy Waters’ trading data—
9 “Sugarman already has the relevant trading data” and should not be permitted to seek
10 production of Muddy Waters’ “largely duplicative information.” *Id.* at 8.

11 On January 8, 2019, the Court granted in part and denied in part the motion to
12 quash and ordered Muddy Waters to produce documents reflecting (a) transactions
13 in Banc stock and related profits, and (b) the bases for the decision to engage in those
14 transactions. MW Dkt. 31 (Order) at 3-5. The Court also ordered in advance, and
15 without seeing the actual documents Muddy Waters would ultimately produce, that
16 the documents be designated AEO pursuant to the Protective Order. *Id.* at 5. Weeks
17 later on January 30, 2019, Muddy Waters produced a small set of documents (61
18 total) that

19 [REDACTED] but lacked any meaningful documents regarding the new information
20 Mr. Sugarman was seeking—such as the reasons why Muddy Waters made the
21 trades. Declaration of Andrew Gray (“Gray Decl.”) ¶ 2. [REDACTED]
22 [REDACTED]
23 [REDACTED]
24 [REDACTED]

25 On February 11th, Mr. Sugarman filed a partially sealed brief contending that
26 Muddy Waters failed to comply with the Court’s order, and on February 15th the
27 Court agreed and ordered Muddy Waters to produce the withheld documents. MW
28 Dkts. 37-1, 43. On February 19th, the author of the Blog appeared anonymously and

1 requested among other things that the Court reconsider its ruling, prompting Muddy
2 Waters to refuse to produce documents until that request was heard. *See* MW Dkt.
3 45 at 1. On March 6th, the Court granted the blogger's request to protect its identity
4 from production but did not reconsider its order that Muddy Waters produce
5 documents. MW Dkt. 67. On that same day, however, the District Court ordered a
6 moratorium on all court filings. Dkt. 551 at 2. Muddy Waters never produced any
7 additional documents and thus their one production, referenced in the Lee Report,
8 included only largely duplicative trading data and not the key, new information Mr.
9 Sugarman had sought multiple times in Court.⁴

10 **C. The Lee Report Was Not Derived From Muddy Waters' Document
11 Production**

12 Professor Lee issued his expert report on February 22, 2019. The Report is 82
13 pages long, with 52 pages of text and a 30-page Appendix. *See* Block Ex. B, Dkt.
14 629 (Lee Report). Professor Lee's opinion is summarized in paragraph 16 of the
15 Report: [REDACTED]

16 [REDACTED]
17 [REDACTED]
18 [REDACTED]
19 [REDACTED]
20 [REDACTED]
21 [REDACTED]
22 [REDACTED]
23 [REDACTED]
24 [REDACTED]
25 [REDACTED]

26 _____
27 ⁴ Muddy Waters appears to claim to have made two productions of documents. *See*
28 Motion at 8; Block Decl. ¶ 10. Latham has been unable to find any record of a
second production, beyond the potential transmission in February 2019 of the
native version of a spreadsheet included in the original production.

1 [REDACTED]
2 [REDACTED]
3 [REDACTED]
4 [REDACTED]
5 [REDACTED]
6 [REDACTED]
7 [REDACTED]
8 [REDACTED]
9 [REDACTED]
10 [REDACTED]
11 [REDACTED]
12 [REDACTED]
13 [REDACTED]
14 [REDACTED]
15 [REDACTED]
16 [REDACTED]
17 [REDACTED]
18 [REDACTED]
19 [REDACTED]
20 [REDACTED]
21 [REDACTED]
22 [REDACTED]
23 [REDACTED]
24 [REDACTED]

25 Latham filed two oppositions to discovery motions and produced another
26 expert report the day Professor Lee issued his Report, and defended a deposition the
27 day before, illustrating the intensity of the litigation at the time. *See* MW Dkts. 54-
28 1; 58-1; Abascal Decl. ¶ 6. As noted, twelve days later on March 6, 2019, the Court

1 imposed a moratorium on future filings and ordered the parties to mediate. Dkt. 551.
2 On September 19, 2019, the parties reached a settlement in principle and the Court
3 stayed the proceedings to facilitate approval of the settlement by the class. Dkt. 588.
4 The case was dismissed in March 2020. Dkt. 614. Professor Lee was never deposed.

5 **D. Subsequent Events Following Termination of the Action Reflect
6 Ongoing Litigation Between Mr. Sugarman, Muddy Waters and
Adam Levine**

7
8 Muddy Waters' Motion for Sanctions (the "Motion") is brought in the context
9 of ongoing subsequent litigation between Mr. Sugarman, Muddy Waters, and the
10 declarant to the Motion, Adam Levine. Latham is not counsel of record in any of
11 these matters. Abascal Decl. ¶ 9.

12 In 2019 and 2021, Mr. Sugarman sued Muddy Waters and other short sellers.
13 See *Steven A Sugarman v. Muddy Waters Capital LLC*, No. 2:21-cv-01453 (C.D.
14 Cal.); *Steven Sugarman v. Muddy Waters Capital LLC*, No. 3:19-cv-04248 (N.D.
15 Cal.); *Steven A. Sugarman v. Muddy Waters Capital, LLC*, No. 27-cv-21-11850
16 (Hennepin County District Court). According to public reports, in or around 2021, a
17 company associated with Mr. Sugarman hired Adam Levine and in 2023 terminated
18 him. On April 21, 2023, Mr. Sugarman sought and obtained a restraining order
19 against Mr. Levine for harassment, and now claims that he violated it. See generally
20 *The Change Company CDFI LLC v. Adam Levine*, No. 23STRO01946 (Superior
21 Court of California, County of Los Angeles). In August 2023, Mr. Levine was
22 reportedly arrested near Mr. Sugarman's office for impersonating a police officer.
23 See Statement Regarding the Arrest of Adam Levine for Impersonating a Police
24 Officer, The Change Company (August 28, 2023), available at
25 <https://www.thechangecompany.com/post/statement-regarding-the-arrest-of-adam-levine-for-impersonating-a-police-officer>. In October 2023, Mr. Sugarman sued Mr.
26 Levine for fraud, alleging extortion and theft of documents. See *The Change
27 Company CDFI LLC v. Adam Levine*, No. 23SMCV04879 (Superior Court of
28 California).

1 California, Los Angeles County). Mr. Levine has also sued Mr. Sugarman for
2 wrongful termination. *Adam Levine v. The Change Company CDFI LLC*, No. 30-
3 2023-01331710 (Superior Court of California, Orange County).

4 According to evidence in the Motion, in April 2023 after Levine was
5 terminated and served with a restraining order, he shared with Muddy Waters
6 documents Mr. Sugarman claims were stolen, including a February 2022 email Mr.
7 Sugarman had sent to Mr. Levine that was marked attorney-client privileged and
8 included the Lee Report. *See* Levine Decl. Ex. D; Block Decl. ¶ 16. Mr. Sugarman
9 contends Muddy Waters and their counsel violated California Rule of Professional
10 Conduct 4.4 by failing promptly to inform Mr. Sugarman of this unauthorized
11 disclosure of his privileged information. *See* California Rule of Prof. Conduct 4.4;
12 *see also Clark v. Superior Ct.*, 196 Cal. App. 4th 37, 52 (2011) (attorney that comes
13 into possession of privilege documents is obligated “not to review these documents
14 more than was reasonably necessary to make the determination that they were
15 privileged and to immediately notify [the applicable party] that [it was] in possession
16 of [its] privileged documents.”). Between April and August 2023, Muddy Waters
17 appears to have read and studied the Lee Report and other documents stolen by Mr.
18 Levine. In August, counsel for Muddy Waters alerted Latham and Mr. Sugarman
19 that it intended to file the Motion, and the parties then met and conferred. Abascal
20 Decl. ¶ 7. In an effort to resolve this matter, Latham offered to follow the procedures
21 in the Protective Order relating to inadvertent or other disclosure of designated
22 information but Muddy Waters rejected the offer and instead filed its motion seeking
23 sanctions, contempt, and discovery. *Id.* ¶ 8.

24 **III. LEGAL STANDARD**

25 **A. Substantial Compliance and Contempt**

26 “[A] person should not be held in contempt if his action ‘appears to be based
27 on a good faith and reasonable interpretation of the [court’s order].’” *In re Dual-*
28 *Deck*, 10 F.3d at 695 (quoting *Vertex Distrib., Inc. v. Falcon Foam Plastics, Inc.*,

1 689 F.2d 885, 889 (9th Cir.1982)). “‘Substantial compliance’ with the court order is
2 a defense to civil contempt, and is not vitiated by ‘a few technical violations’ where
3 every reasonable effort has been made to comply.” *Id.* (quoting *Vertex*, 689 F.2d at
4 891). “The party alleging civil contempt must demonstrate that the alleged
5 contemnor violated the court’s order by ‘clear and convincing evidence,’ not merely
6 a preponderance of the evidence.” *Id.* (quoting *Vertex*, 689 F.2d at 889).

7 **B. Rule 37 Sanctions**

8 “Federal courts have discretion whether to impose sanctions for violation of a
9 protective order. Such violations may, but do not necessarily, constitute sanctionable
10 conduct . . . a court must look to the totality of the circumstances surrounding each
11 violation.” *Sanders*, 2022 WL 17542683, at *2 (citing Fed. R. Civ. P. 37(b)(2)(A));
12 *see also* Fed. R. Civ. P. 37(b)(2)(C) (court has discretion in awarding expenses
13 including where “other circumstances make an award of expenses unjust”).
14 “Although Rule 37 permits district courts to impose sanctions . . . this power must
15 be exercised with restraint.” *Aristocrat Techs. v. Int'l Game Tech.*, 2009 WL
16 3573327, at *4 (N.D. Cal. Oct. 30, 2009). “In order to determine whether or not a
17 protective order has been violated, courts focus on the terms of the order itself.”
18 *Sanders*, 2022 WL 17542683, at *2. The court may consider the good faith of a party
19 when considering sanctions. *Glob. Master Int'l Grp., Inc. v. Esmond Nat., Inc.*, 2021
20 WL 1324435, at *2 (C.D. Cal. Mar. 12, 2021); *Lambright v. Ryan*, 698 F.3d 808,
21 826 (9th Cir. 2012) (finding no error in district court’s decision not to hold
22 evidentiary hearing or impose severe sanction because of finding that party’s
23 conduct was inadvertent).

24 **IV. ARGUMENT**

25 **A. Latham Substantially Complied With The Protective Order In Its
26 Designation of the Lee Report As Confidential**

27 Latham substantially complied with the Protective Order in its handling of the
28 Lee Report. The initial designation of the Report as “Confidential” was in substantial

1 compliance because the Report and its opinion are not “derived from” the limited
2 and largely cumulative documents produced by Muddy Waters. Section II.2 of the
3 Protective Order makes clear that information “derived from” AEO information also
4 constitutes AEO information only “to the extent the derived information embodies,
5 contains or discloses” AEO information. The Report does not meet this standard
6 because its opinion does not depend upon and was not derived from the few Muddy
7 Waters documents. Rather, the opinion was formed from evidence obtained well
8 before Muddy Waters’ production, [REDACTED]

9 [REDACTED]
10 [REDACTED] and many other sources, and was disclosed in court
11 several months before Muddy Waters’ production. As admitted by Muddy Waters
12 itself, Muddy Waters’ production [REDACTED]

13 [REDACTED] *See MW Dkt. 11 at 8.* [REDACTED]

14 [REDACTED]
15 [REDACTED]
16 [REDACTED]
17 [REDACTED]
18 [REDACTED]

19 The Court designated Muddy Waters’ anticipated document production as
20 AEO in the context of Mr. Sugarman’s request for new information beyond the
21 trading data Professor Lee already had, but Muddy Waters never produced any
22 meaningfully new information. The incomplete document production was only 1 out
23 of [REDACTED]

24 [REDACTED] *See Block Ex. B (Lee Report) at 81.*

25 Further, the Report [REDACTED]

26 [REDACTED]
27 [REDACTED] For the Court’s convenience, we have prepared an
28 exhibit that highlights the portions of the Lee Report that describe information in

1 Muddy Waters' production. *See* Abascal Decl. Ex. 1; ¶ 2. These portions [REDACTED]
2 [REDACTED]
3 [REDACTED]
4 [REDACTED]
5 [REDACTED]
6 [REDACTED]
7 [REDACTED]

8 In its argument that the entire Lee Report was "derived from" their documents,
9 Muddy Waters misquotes Professor Lee out of context to suggest that he identified
10 Muddy Waters as a short seller from their documents. Motion at 9-10. In fact,
11 Professor Lee makes abundantly clear in his Report that [REDACTED]

12 [REDACTED] *See* Block Ex. B (Lee
13 Report) at n.50. In October 2018, months prior to Muddy Waters' production,
14 Professor Lee's colleague also described in detail in a declaration how they
15 discovered Muddy Waters' identity from other sources. MW Dkt. 9-1 at 4-5. Even
16 Muddy Waters itself acknowledged this fact in its publicly filed Motion to Quash.
17 MW Dkt. 1 at 17 ("[I]t is Movants' understanding that Defendant Sugarman
18 obtained their identities and information about their trading activity in Banc
19 securities from discovery produced by another nonparty, ACS Execution Services
20 LLC . . ."). Indeed, this independent data is what prompted Mr. Sugarman to
21 subpoena Muddy Waters in the first place.

22 For these reasons, we disagree that the Report and its opinion were "[d]erived
23 in [s]ignificant [p]art [f]rom Muddy Waters' AEO [information]" to warrant a
24 finding of non-compliance. Motion at 9. The very minor portions of the Report that
25 [REDACTED]
26 [REDACTED]

27 [REDACTED] And Latham's offer to follow the procedures in the Protective Order for
28 inadvertent or other disclosures further demonstrates its substantial compliance. *See*

1 *Vertex*, 689 F.2d at 892 (noting “defendants had made every reasonable effort to
2 comply with the court’s order” where defendants had taken steps to correct the
3 violation before the application for an order of contempt).

B. Contempt, Sanctions, And Discovery Are Also Not Warranted In Light of The Totality of The Circumstances

1. Technical Violations Do Not Preclude a Finding of Substantial Compliance Nor Do They Warrant Contempt or Sanctions

Even if Latham’s failure to designate all or portions of the Lee Report as AEO technically violated the Protective Order, a technical error during a years-long, incredibly complex litigation requiring near-daily application of the Protective Order does not preclude a finding of substantial compliance or warrant imposition of civil contempt. *See Kilopass Tech. Inc. v. Sidense Corp.*, 2012 WL 1144290, at *4 (N.D. Cal. Apr. 4, 2012) (denying motion for contempt and finding substantial compliance where counsel provided client with list based largely on information known to client but which was supplemented in part using AEO information); *O’M & Assocs., LLC v. Ozanne*, 2011 WL 2160938, at *5 (S.D. Cal. June 1, 2011) (finding substantial compliance with the protective order because, “[a]lthough much financial information has been produced to Plaintiffs, Hilger wrongfully disclosed one item of confidential information”); *In re Dual-Deck*, 10 F.3d at 695-96 (party accused of violating a protective order “went to great lengths to avoid revealing in the public filings anything it had learned in discovery”).

22 Sanctions are particularly inappropriate here where there is no evidence of
23 bad faith, the “absence [of which] may be considered when deciding whether to
24 impose sanctions.” *Glob. Master*, 2021 WL 1324435, at *2 (denying Rule 37
25 sanctions against party that publicly filed designated documents, finding no
26 willfulness or bad faith and that counsel “promptly remedied the situation as soon as
27 he learned of the mistake”); *see also MediciNova, Inc. v. Genzyme Corp.*, 2018 WL
28 318468, at *7 (S.D. Cal. Jan. 5, 2018) (denying monetary sanctions, noting as

1 relevant that “the record indicates that the subject disclosure was inadvertent and not
2 egregious”); *Finjan, Inc. v. Eset, LLC*, 2019 WL 1429596, at *7 (S.D. Cal. Mar. 29,
3 2019) (finding attorney’s fees and expenses not warranted because the violations
4 were not willful or in bad faith, and “seem to be the result of an erroneous, but not
5 unreasonable interpretation of the Protective Order”). The full record amply
6 demonstrates Latham’s extensive efforts to comply with the Protective Order.

7 Muddy Waters argues that Latham acted intentionally because it “conceded”
8 that it “sought guidance from this Court” on the issue. Motion at 2, 18. That
9 misrepresents both what was said in the meet and confer process and what actually
10 occurred. Latham did not seek guidance from Magistrate Judge McCormick on
11 Muddy Waters’ production or the designation of the Lee Report. Rather, in February
12 2019, Latham informed Magistrate Judge McCormick that the *Parties* in the case
13 had over-designated thousands of pages as AEO, that Latham was not showing such
14 material to Mr. Sugarman out of an abundance of caution, and this was depriving
15 him of access to evidence needed to provide adequate representation. Gray Decl. ¶
16 3. Latham argued that the Protective Order appeared to be drafted for inanimate
17 clients (i.e., corporations or a class) and was thus ambiguous as to whether Mr.
18 Sugarman, an individual, could review AEO materials. Latham sought guidance
19 from the court on what AEO documents could be shown to Mr. Sugarman and
20 Magistrate Judge McCormick said he would consider the issue, but it was mooted
21 shortly thereafter when the District Court issued its moratorium. *Id.* These facts
22 illustrate that Latham conscientiously and proactively sought judicial guidance on
23 the Protective Order.

24 The cases cited by Muddy Waters do not support sanctions here because they
25 involve much more egregious conduct and bad faith. *See Gonzales v. Charter*
26 *Comm’ns, LLC*, 2022 WL 570003, at *5-6 (C.D. Cal. Jan. 26, 2022) (declining to
27 hold in contempt, but sanctioning, attorneys found to have acted in bad faith by using
28 confidential information shared by defendants to solicit new clients); *Spin Master*,

1 *Ltd. v. Zobmondo Ent., LLC*, 2012 WL 12882012, at *4-7 (C.D. Cal. Feb. 13, 2012)
2 (declining to hold in contempt, but sanctioning, attorney who shared opposing
3 party's expert reports containing confidential sales and financial information marked
4 AEO with client who was a direct competitor); *Clarke v. First Transit, Inc.*, 2012
5 WL 12877865, at *14 (C.D. Cal. Nov. 2, 2012) (issuing contempt and sanctions
6 against who used confidential information for the "improper purposes of pursuing
7 claims outside the [] action"); *Beam Sys., Inc. v. Checkpoint Sys., Inc.*, 1997 WL
8 364081, at *5-6 (C.D. Cal. Feb. 6, 1997) (disqualifying expert and imposing
9 attorneys' fees for sharing "restricted" information with an expert misleadingly
10 presented as independent, who was "for all practical purposes an employee of [the
11 party]"); *OmniGen Rsch., LLC v. Wang*, 2018 WL 11512767, at *10 (D. Or. Nov. 6,
12 2018) (in action for theft of confidential information by clients, holding attorney in
13 contempt for sharing with clients seven productions of opposing party's documents
14 marked AEO, knowing he was violating protective order); *Elkharwily v. Mayo
Holding Co.*, 2017 WL 1373256, at *1-2 (D. Minn. Apr. 13, 2017) (holding in
16 contempt party who contacted patients and families of patients identified in
17 confidential discovery by defendant healthcare company); *Systemic Formulas, Inc.
v. Kim*, 2009 WL 5205995, at *1-2, 4 (D. Utah Dec. 23, 2009) (holding in contempt
19 attorney who made misrepresentations to the Court and provided client with identity
20 of opposing parties' clients which had been marked AEO).

21 The opinion in *Youngevity International v. Smith* is instructive. There, a
22 party's attorneys allegedly disclosed AEO information in public filings, to witnesses,
23 and through the disclosure of certain data contained in an expert report. 2019 WL
24 157269, at *1. The court found no sanctions were warranted based on the volume of
25 confidential data produced and designated in the case:

26 Here, Wakaya produced about 116,000 documents and designated
27 about 114,000 as confidential under the protective order. Even if
28 Youngevity did make improper disclosures in the few instances . . . the
circumstances are not sufficiently extreme as to warrant sanctions.

Indeed, the sheer volume of documents produced, ninety-eight percent of which was deemed confidential, relative to the very minimal alleged disclosures . . . constitutes precisely the kind of circumstance provided for in Rule 37(b)(2)(C) that would make an award of attorney's fees unjust. Moreover, there is no showing of bad faith or prejudice. Given Youngevity's adherence to the protective order otherwise, sanctions in the form of attorney's fees would not be just.

Id., at *2. This holding is equally appropriate here given the ten-fold greater amount of discovery.

2. Muddy Waters Has Published The Information It Contends Was Derived From AEO-Designated Documents, Discrediting Their Request for Relief

The Protective Order is solely intended to protect "nonpublic and competitively-sensitive" information, Protective Order at 1, and makes clear that "[m]aterial may not be designated if it has been made public." *Id.*, II.3. Here, Muddy Waters has repeatedly failed to treat the Lee Report and information therein as if it were "derived from" AEO-designated documents, including by repeatedly filing in public the information they claim was "derived from" its AEO-designated documents. For example, Muddy Waters filed its 2018 Motion to Quash and Reply publicly, and admitted therein that it shorted Banc stock before the publication of the Blog, [REDACTED]

[REDACTED] *See* MW Dkt. 11 at 1 n.1 ("any equity purchases were made to cover short positions"). Muddy Waters also has publicly disclosed in its present motion [REDACTED]

[REDACTED] "Lee makes a series of speculative arguments around a theory that certain traders were . . . responsible for the 29% decline in Banc's stock price on October 18, 2016." Motion at 9; *see also id.* (describing the contents of the Lee Report and stating "all of this information was obtained from the trading documents Muddy Waters produced"). More importantly, Muddy Waters also filed publicly as

1 an exhibit to their Motion a document that purports to be a transcript of a recorded
2 conversation between Mr. Sugarman and a reporter that Muddy Waters claims
3 disclosed “confidential information contained in and derived from” the Lee Report.
4 Levine Declaration ¶ 19 & Ex. B. If the transcript did contain “derived from”
5 information, Muddy Waters should have filed it under seal. In addition, Muddy
6 Waters served the Lee Report upon Mr. Sugarman's counsel, Michelman &
7 Robinson, without asking them to sign Exhibit A to the Protective Order or otherwise
8 acknowledge that they agree to comply with the Order. If this information about
9 trades made over 7 years ago were truly “extremely sensitive” information that
10 would “create a substantial risk of serious harm” meriting the “derived from” AEO
11 designation, then Muddy Waters should and would have filed all of this information
12 (and its entire motion for that matter) under seal and otherwise followed the
13 Protective Order. Their failure to do so discredits their “derived from” arguments
14 and their requests for contempt, sanctions and additional discovery. *Kilopass Tech.*,
15 2012 WL 1144290, at *4 (party’s public filing of its own AEO information “weighs
16 in favor of denying [its] application” for contempt based on opposing party’s alleged
17 unauthorized disclosure); *Glob. Master*, 2021 WL 1324435, at *2 (considering the
18 lack of prejudice in finding that an imposition of sanctions would be unjust). Indeed,
19 we note that none of the reporters who received purportedly “derived from” AEO
20 information ever mentioned the Lee Report in their subsequent articles. See Motion
21 at 11 n.4, 12 nn.6-7. Thus, the only public descriptions of the contents of the Lee
22 Report were published by Muddy Waters.

23 **3. The Case Law Does Not Support Muddy Waters’ Broad
24 Request For Discovery, Which Appears Intended For
25 Another Purpose**

26 Muddy Waters requests broad discovery, including that Latham and Mr.
27 Sugarman engage in a substantial document review and production as well as
28 depositions. This request is inappropriate for several reasons. Muddy Waters has not

1 made a “prima facie showing” of contempt against Latham. *See Cardell Fin. Corp.*
2 v. *Suchodolski Assocs., Inc.*, 2012 WL 12932049, at *58-60 (S.D.N.Y. July 17,
3 2012) (explaining that a “prima facie” showing is made where the movant’s “proffer,
4 if credited, would justify a finding of contempt”). In addition, the discovery sought
5 is covered by the attorney-client privilege and work product protections. *See United*
6 *States v. Sanmina Corp.*, 968 F.3d 1107, 1119 (9th Cir. 2020) (attorney’s thought
7 processes and analysis are protected work product). It is disfavored to seek discovery
8 from counsel. *See Zucchella v. Olympusat, Inc.*, 2021 WL 4785939, at *3 (C.D. Cal.
9 June 16, 2021) (granting protective order and denying deposition of attorney, noting
10 “[i]t is undisputed that depositions of opposing counsel are disfavored”);
11 *Teksystems, Inc. v. Siminipour*, 2008 WL 11343027, at *3 (C.D. Cal. July 1, 2008)
12 (denying written discovery on and deposition of in house counsel); *Soukhaphonh v.*
13 *Hot Topic, Inc.*, 2017 WL 10378493, at *6-7 (C.D. Cal. Sept. 14, 2017) (denying
14 deposition of general counsel).

15 Muddy Waters appears to argue that privilege and work product protections
16 should not apply because “evidence of a willful violation of the Protective Order” is
17 “not privileged under the crime-fraud exception.” Declaration of Dilan Esper at ¶
18 10, Dkt. 625; *see also* Motion at 22 (citing several cases discussing the crime-fraud
19 exception to privilege and work product). This suggestion of “crime-fraud” is totally
20 unfounded and baseless. The crime-fraud exception applies only to documents and
21 communications that were themselves in furtherance of illegal or fraudulent conduct,
22 *see In re Grand Jury Investigation*, 810 F.3d 1110, 1113-14 (9th Cir. 2016), and it
23 is frivolous to suggest in this complex case involving over a million of pages of
24 discovery that the designation of the Lee Report as Confidential instead of AEO was
25 in furtherance of a criminal act. Cf. *United States v. HVI Cat Canyon, Inc.*, 2017 WL
26 11532929, at *9 (C.D. Cal. Jan. 5, 2017) (party must show client was engaged in
27 criminal or fraudulent scheme and attorney-client communications were sufficiently
28 related to and in furtherance of illegality). The requested discovery is also unduly

1 burdensome given the conclusion of the case, the age of the data, the lack of
2 prejudice, Muddy Waters' own publication of the contested information and other
3 attending circumstances. *See, e.g., Lakes v. Bath & Body Works, LLC*, 2020 WL
4 4350243, at *4 (E.D. Cal. July 29, 2020) (rejecting discovery where "the motion
5 seeks the information that plaintiff hopes will reveal the existence of a *prima facie*
6 case") (emphasis in original); *Ahearn ex rel. N.L.R.B. v. Int'l Longshore &*
7 *Warehouse Union, Locs. 21 & 4*, 721 F.3d 1122, 1130 (9th Cir. 2013) (affirming
8 denial of request for discovery in civil contempt proceedings). Muddy Waters' cited
9 cases are not to the contrary because they did not approve the broad discovery sought
10 here. *See Clarke*, 2012 WL 12877865, at *16 (requiring attorneys to submit to the
11 court a list of the names to whom the contested information was sent); *OmniGen*,
12 2018 WL 11512767, at *12 (requiring attorney to provide a declaration describing
13 each instance in which clients were provided with access to AEO materials and
14 related transmittal emails).

15 The discovery appears intended to further Muddy Waters', and perhaps their
16 declarant Levine's, interests in significant, ongoing parallel legal disputes. The case
17 law is clear that it is improper to pursue discovery in one proceeding for the purpose
18 of assisting in another proceeding. *See Oppenheimer Fund, Inc. v. Sanders*, 437 U.S.
19 340, 352 n.17 (1978); *In re Refco Sec. Litig.*, 759 F. Supp. 2d 342, 345 (S.D.N.Y.
20 2011) (denying discovery after concluding "the true purpose of the . . . request for
21 the [document] is to bolster claims in the arbitration").

22 **V. CONCLUSION**

23 For the foregoing reasons, Latham respectfully requests that the Court deny
24 the Motion for Sanctions and Contempt Order.

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1 Dated: November 24, 2023

Respectfully Submitted,

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2 **CERTIFICATE OF COMPLIANCE**
3

4 The undersigned, counsel of record for Latham & Watkins LLP, certifies that
5 this brief contains 6,974 words and 21 pages, which complies with the word limit of
6 L.R. 11-6.1 and the Initial Standing Order of the Hon. Dolly M. Gee.
7

8 Dated: November 24, 2023

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